

October 28, 2005

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Allan C. Harris

Date of Filing: September 23, 2005

Case Number: TFA-0121

On September 23, 2005, Allan C. Harris (Harris) filed an appeal from a determination issued to him on August 22, 2005 by the Department of Energy's (DOE) Environmental Management Consolidated Business Center (CBC). In that determination, CBC denied a request for a waiver of fees in connection with a request that Harris submitted under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. This appeal, if granted, would overturn CBC's determination and waive in full the fees associated with his request.

I. Background

Harris filed a request under the FOIA for "electronic records, with supporting descriptive documents and etc., of all at- and below-grade soil data and all remotely sensed (aerial and/or satellite) data from the U.S. Department of Energy Miamisburg Closure Project and the U.S. Department of Energy Fernald Closure Project." Electronic Mail Message from Harris to Claudia S. Gleicher, CBC (July 12, 2005). According to Harris, he planned to use this information in preparing an unsolicited proposal to the DOE. *Id.*

In his FOIA request, Harris also requested a fee waiver for the costs associated with processing the request. In its August 22, 2005 determination letter, CBC denied a fee waiver. Letter from Marian Wilcox, Freedom of Information Officer, CBC, to Harris (August 22, 2005) (Determination Letter). CBC determined that "the primary purpose for [Harris'] FOIA request is commercial." *Id.*

Harris filed the present appeal on September 23, 2005. Letter from Harris to OHA (September 22, 2005) (Appeal Letter). In his appeal, Harris states that the requested information will not be used for commercial activity. Rather, he states, the information will be used "to implement a Stakeholder Environmental Management System (SEMS)" and to develop educational research courses. Appeal Letter.

II. Analysis

The FOIA generally requires that requesters pay fees associated with processing their requests. 5 U.S.C. § 552(a)(4)(A)(i); *see also* 10 C.F.R. § 1004.9(a). However, the FOIA provides for a reduction or waiver of fees only if a requester satisfies his burden of showing that disclosure of the information (1) is in the public interest because it is likely to contribute significantly to public understanding of the operations of the government; and, (2) is not primarily in the commercial interest of the requester. 5 U.S.C. § 552(a)(4)(A)(iii); *see also* 10 C.F.R. § 1004.9(a)(8).

A. Whether Requested Information Is In the Public Interest

In analyzing the public-interest prong of the two-prong test, the regulations set forth the following factors the agency must consider in determining whether the disclosure of the information is likely to contribute significantly to public understanding of government operations or activities:

- (A) The subject of the request: Whether the subject of the requested records concerns “the operations or activities of the government” (Factor A);
- (B) The informative value of the information to be disclosed: Whether disclosure is “likely to contribute” to an understanding of government operations or activities (Factor B);
- (C) The contribution to an understanding by the general public of the subject likely to result from disclosure (Factor C); and
- (D) The significance of the contribution to public understanding: Whether the disclosure is likely to contribute “significantly” to public understanding of government operations or activities (Factor D).

10 C.F.R. § 1004.9(a)(8)(i).

1. Factor A

Factor A requires that the requested documents concern the “operations or activities of the government.” *See Department of Justice v. Reporters Comm. for Freedom of the Press*, 109 S. Ct. 1468, 1481-1483 (1989); *U.A. Plumbers and Pipefitters Local 36*, 24 DOE ¶ 80,148 at 80,621 (1994). In the present case, there appears to be no dispute that the requested information – electronic records, with supporting descriptive documents, etc., of all at- and below-grade soil data and all remotely sensed (aerial and/or satellite) data from the U.S. Department of Energy Miamisburg Closure Project and the U.S. Department of Energy Fernald Closure Project – concerns activities or operations of the government. Therefore, we find that Harris’ request satisfies Factor A.

2. Factor B

Under Factor B, disclosure of the requested information must be likely to contribute to the public's understanding of specifically identifiable government operations or activities, i.e., the records must be meaningfully informative in relation to the subject matter of the request. *See Carney v. Department of Justice*, 19 F.3d 807, 814 (2d Cir. 1994). This factor focuses on whether the information is already in the public domain or otherwise common knowledge among the general public. *See Roderick Ott*, 26 DOE ¶ 80,187 (1997); *Seehuus Associates*, 23 DOE ¶ 80,180 (1994) ("If the information is already publicly available, release to the requester would not contribute to public understanding and a fee waiver may not be appropriate.").

In the present case, CBC has been informed us that the requested information is not already publicly available. *See* Memorandum of Telephone Conversation between Marian Wilcox, CBC FOIA/PA Officer, and Diane DeMoura, OHA (October 3, 2005). Therefore, we find that Harris has satisfied Factor B.

3. Factor C

Factor C requires that the requested documents contribute to the general public's understanding of the subject matter. Disclosure must contribute to the understanding of the public at large, as opposed to the understanding individually of the requester or of a narrow segment of interested persons. *Schrecker v. Department of Justice*, 970 F. Supp. 49, 50 (D.D.C. 1997). Thus, the requester must have the intention and ability to disseminate the requested information to the public. *Ott*, 26 DOE at 80,780; *see also Tod N. Rockefeller*, 27 DOE ¶ 80,184 (1999); *James L. Schwab*, 22 DOE ¶ 80,133 (1992). In the present case, Harris states that, in addition to aiding in his preparation for an unsolicited proposal to DOE, the requested information will be used to create educational courses and will assist the DOE in various ways. CBC determined that Harris' primary intention in making the request was not directed at contributing to the general public's understanding of government operations, but rather was to assist him in preparing an unsolicited proposal to the DOE. *See* Appeal Letter. Furthermore, CBC determined that, even if the request were directed at contributing to the public's understanding of government operations, Harris did not adequately demonstrate an ability to disseminate the information. *Id.*

We agree with CBC that Harris has not provided adequate evidence of his ability to disseminate the requested information to the public. Any public benefit derived from Harris' unsolicited proposal is contingent on the DOE accepting and then publishing that proposal or on Harris' publishing the information himself. We have no evidence before us to indicate that such publication will occur. Furthermore, Harris has not demonstrated that the general public will benefit from his development of educational courses. Consequently, we find that Harris has not satisfied Factor C.

4. Factor D

Under Factor D, the requested documents must contribute significantly to the public understanding of the operations and activities of the government. “To warrant a fee waiver or reduction of fees, the public’s understanding of the subject matter in question, as compared to the level of public understanding existing prior to the disclosure, must be likely to be enhanced by the disclosure to a significant extent.” *Ott*, 26 DOE at 80,780 (quoting *1995 Justice Department Guide to the Freedom of Information Act*, 381 (1995)).

In the present case, it remains unclear to what extent the public’s understanding is likely to be enhanced by the disclosure of the information. However, we need not reach the issue because the inability to disseminate the information to the public is, in itself, a sufficient basis for denying a fee waiver request. *See Donald R. Patterson*, 27 DOE ¶ 80,267 at 80,927 (2000) (citing *Larson v. CIA*, 843 F.2d 1481, 1483 (D.C. Cir. 1988)).

B. Whether Requested Information is Primarily in Requester’s Commercial Interest

As stated above, we have determined that Harris has not demonstrated that his request is “in the public interest because it is likely to contribute significantly to public understanding of the operations of the government.” 5 U.S.C. § 552(a)(4)(A)(iii); *see also* 10 C.F.R. § 1004.9(a)(8). However, assuming *arguendo* that Harris’ request did satisfy the public-interest prong of the test, we find that the request is primarily in Harris’ commercial interest and, therefore, does not satisfy the commercial-interest prong of the test.

A “commercial interest” has been defined as “one that furthers a commercial, trade or profit interest as those terms are commonly understood.” *See Department of Justice Freedom of Information Act Guide*, 133 (2004). In the present case, CBC determined that the primary purpose of Harris’ request – to use the information in developing an unsolicited proposal to the DOE – was commercial. Appeal Letter. Harris contends that the requested information will be used to develop educational research classes and therefore “will not be commercialized.” *Id.*

We agree with CBC that the request is primarily in Harris’ commercial interest. While it is true that a proposal, if accepted, could potentially provide some benefit to an agency or the general public, submitting an unsolicited proposal to an agency is an inherently commercial activity. A submitter’s desired result is for the agency to accept the proposal and compensate the submitter in some manner.

III. Conclusion

As the foregoing indicates, Harris has failed to adequately demonstrate his intention and ability to disseminate the requested information to the public. Therefore, we find that Harris has not shown that disclosure of the requested information is likely to contribute to public understanding of government operations or activities. We further find that even if Harris had demonstrated that the disclosure of the requested information would be in the public

interest, the requested information is primarily in Harris' commercial interest. Accordingly, the appeal should be denied.

It Is Therefore Ordered That:

(1) The Appeal filed on September 23, 2005 by Allan C. Harris, OHA Case No. TFA-0121, is hereby denied.

(2) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review. Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay
Director
Office of Hearings and Appeals

Date: October 28, 2005